The BOC may insist, however, as a condition of its participation in the joint venture, that the joint venture itself will purchase basic transmission services to provide the electronic publishing service exclusively from the BOC.[55] Such a condition is plainly consistent with the terms of the Act. Specifically, Section 274(c)(2)(C) addresses a BOC's "*participat[ion]* on a nonexclusive basis." Thus, the Act's focus is on avoiding the foreclosure of opportunities for more than one entity to participate in a joint venture with a BOC or for a BOC to participate with more than one partner. This nonexclusivity provision does not at all, however, address the relationship between the BOC and the joint venture enterprise itself.

E. Nondiscrimination Safeguards

Section 274(d) imposes a general nondiscrimination obligation on BOCs to provide network access and interconnections to other electronic publishers at tariffed rates.[56] BellSouth concurs with the Commission's apparent assessment that the obligations of Section 274(d) are essentially the same as those under which the BOCs for several years have been providing enhanced services, including electronic publishing, pursuant to the Commission's *Computer III* and *Open Network Architecture ("ONA")* policies and programs.[57] No further explication of these obligations is required.

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[55] *Notice* at ¶ 63 (inquiring whether a BOC may require an electronic publisher with whom the BOC establishes a joint venture relationship to purchase the electronic publisher's (as opposed to the joint venture's) basic transmission services exclusively from the BOC).

[56] 47 U.S.C. § 274(d).

[57] *Notice* at ¶ 65-66.

IV. ALARM MONITORING

Alarm monitoring services are excluded from the separate affiliate requirements of Section 272(b), even to the extent such alarm monitoring services might constitute an interLATA information service.[58] Instead, Congress has chosen to prohibit entirely the BOCs' provision of alarm monitoring services for a matter of years. BOCs that were not providing alarm monitoring services on November 30, 1995, may not engage in the provision of alarm monitoring services until February 8, 2001.[59] When allowed to provide alarm monitoring services, a BOC is not subject to a separate affiliate requirement, but is subject to a general nondiscrimination obligation.[60]

The Commission seeks to clarify certain aspects of Section 275 regarding activity that constitutes the provision of alarm monitoring services. BellSouth concurs in the Commission's initial assessment that the provision of underlying telecommunications services that may be used to provide alarm monitoring services does not itself constitute provision of alarm monitoring services.[61] To that end, BellSouth notes that it, too, like other BOCs cited by the Commission,[62] has identified in its ONA plan certain transmission offerings useful to alarm monitoring service providers.[63]

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[58] 47 U.S.C. § 272(a)(2)(C).

[59] 47 U.S.C. § 275(a).

[60] 47 U.S.C. § 275(b).

[61] *Notice* at ¶ 69.

[62] *Notice* at ¶ 69.

[63] *See*, e.g., BellSouth Open Network Architecture Amendment, Attachment C, page 105, CC Docket No. 88-2, Phase I (filed May 19, 1989).

In addition, BellSouth has previously obtained a waiver of the Computer II rules to provide spread spectrum alarm services.[64] In granting the waiver, the Commission summarized the nature of BellSouth's service proposal as follows:

> BellSouth's petition proposes to provide a service to alarm companies that consists of the following components: 1) a remote module located on the customer's premises; 2) a network component; and 3) a remote module located on the alarm company's premises. The remote module located at the customer's premises would continuously emit a spread signal over ordinary telephone loops to a BOC central office. . . . The network component would be installed by BellSouth at its central offices. The network component demodulates the spread spectrum signal received from the remote premises module and converts it to ASCII code so it can be transmitted over the public switched network to a predesignated alarm service company for processing. The network component also performs a "scanning" function to detect the triggering of an alarm. The remote module, located on the alarm company premises, monitors the signals emanating from the remote module at the customer's premises.[65]

The Commission should confirm that prior authorizations to provide such enhanced alarm services are grandfathered under Section 275(b).[66]

The Commission also should avoid an interpretation of Section 275 that would render unlawful otherwise lawful relationships between a BOC and an alarm monitoring service provider. Thus, the Commission should conclude that activities or relationships of the types suggested in the *Notice*,[67] such as billing and collection, sales agency, marketing, and various compensation

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[64] *South Central Bell Telephone Company and Southern Bell Telephone and Telegraph Company; Waiver of Section 64.702 of the Commission's Rules and Regulations to Provide Spread Spectrum Transmission Services*, 3 FCC Rcd 4757 (1988) ("*BellSouth Spread Spectrum Order*").

[65] *BellSouth Spread Spectrum Order* at ¶ 16.

[66] Of course, if the Commission concludes such service is not an "alarm monitoring service" under Section 275(e), then the prohibition of Section 275(a)(i) is not applicable and the grandfathering provisions of Section 275(a)(2) are not needed for BellSouth to offer the service.

[67] *Notice* at ¶ 71.

arrangements (including revenue sharing), do not rise to the level of "engag[ing] in the provision of alarm monitoring services."[68]

That Congress did not intend such relationships to constitute the "provision of alarm monitoring services" is shown by comparison with the only defined constraints imposed on a BOC's expansion of grandfathered alarm monitoring services under Section 275(a)(2). There, Congress prohibited a BOC with grandfathered alarm monitoring services from "acquir[ing] any equity interest in, or obtain[ing] financial control of, any unaffiliated alarm monitoring service entity"[69] for the same five-year period that non-grandfathered BOCs are precluded from "engag[ing] in the provision of alarm monitoring services." Thus, Congress has drawn a parallel limitation on BOCs' provision of alarm monitoring services whether grandfathered or not. Those BOCs that are grandfathered may enter relationships with nonaffiliated entities as long as those relationships do not constitute an "equity interest" or "financial control". Thus, non-equity or non-control relationships with other alarm monitoring service providers are expressly permitted. The same standard should hold true for non-grandfathered BOCs -- no "engag[ing] in the provision of alarm monitoring services" through an "equity interest in" or "financial control of" an alarm monitoring service provider, but relationships short of that remain permitted.

The Commission should also confirm that the scope of the alarm monitoring provision is limited to circumstances in which the purpose of the service is to detect "a possible threat" involving endangerment of "life, safety, or property . . . or other emergency."[70] Thus, the

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[68] 47 U.S.C. § 275(a)(1).

[69] 47 U.S.C. § 275(a)(2).

[70] 47 U.S.C. § 275(e).

Commission should confirm that "alarm monitoring service" does not encompass telecommunications service offerings such as remote meter reading (telemetry or "cellemetry"), remote monitoring of CPE for maintenance and other purposes, or other services in which the purpose of the service offering is not to "alert . . . public safety personnel of [a] threat."[71] Indeed, these examples of remote monitoring of various terminal devices are even more benign illustrations of non-alarm services than is the "telemedicine" example cited by Congress.[72]

Finally, BellSouth concurs with the Commission's assessment that the nondiscrimination obligations imposed in Section 275(b) are coextensive with the Computer III and ONA obligations under which the BOCs have operated for years.[73] No need exists to adopt additional rules to implement the statutory obligations.

V. TELEMESSAGING

The Commission properly notes that Section 260 imposes no separate affiliate requirement on a BOC's or other LEC's telemessaging operations, yet proposes that a BOC's provision of interLATA telemessaging would be subject to the requirements of Section 272(b).[74] While telemessaging meets the statutory definition of an information service, these services were deliberately addressed in separate sections of the 1996 Act. Thus, Congress has indicated its

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[71] *Id.*

[72] Section 275(e)(2) excludes from the definition of alarm monitoring service "a service that uses a medical monitoring device attached to an individual for the automatic surveillance of an ongoing medical condition." 47 U.S.C. § 275(e)(2).

[73] *Notice* at ¶ 74.

[74] *Notice* at ¶ 75.

intent that telemessaging services, even on an interLATA basis, not be subject to the separate affiliate requirements of Section 272.[75]

The Commission also notes that BOCs have been providing intraLATA telemessaging services on an integrated basis under the Commission's Computer III and ONA policies and programs for a number of years. These rules are effectively subsumed by the nondiscrimination requirements of Section 260(a). No new implementing regulations are needed for BOCs' inter- or intraLATA telemessaging services.

The Commission should, however, acknowledge certain nuances in the difference between its definition of enhanced services as it applies to BOCs' voice messaging operations and the definition of telemessaging in the Act. The Act defines telemessaging services to include "*live operator services* used to record, transcribe, or relay messages (other than telecommunications relay services)."[76] In contrast, the Commission's enhanced service definition is limited to "computer processing applications."[77] Thus, for example, while a BOC's offering of a live operator message relay service would be subject to the nondiscrimination provisions of Section 260, it would not be subject to the Computer II separation requirements or CEI plan requirements of Computer III.

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[75] Moreover, as BellSouth explained above, application to BOCs' telemessaging operations of the separate subsidiary requirement for BOCs' interLATA information services in Section 272(a)(2)(C) of the 1996 Act would violate the First Amendment and Bill of Attainder Clause of the Constitution. Where it can, the Commission must interpret the 1996 Act to avoid perpetuation of these constitutional infirmities. Accordingly, the Commission must refrain from applying the separate subsidiary requirements of Section 272(a)(2)(C) to BOCs' interLATA telemessaging operations.

[76] 47 U.S.C. § 260(c) (emphasis added).

[77] 47 C.F.R. § 64.702(a).

VI. ENFORCEMENT ISSUES

Among other enforcement issues, the Commission has sought comment on whether "shifting the ultimate burden of proof from the complainant to the defendant" for purposes of complaints arising under Sections 274, 275, or 260 "advances the pro-competitive goals of the 1996 Act."[78] In the *BOC In-Region NPRM*, the Commission based this same proposal in part on an analogy to Section 202(a), where, after a complainant satisfies its burden of proving discrimination, the burden shifts to the defendant to prove that such discrimination is just or reasonable.[79] As BellSouth showed in its comments in that earlier proceeding,[80] the proposal to shift the burden of proof is unlawful, except as to the reasonableness of discrimination.

The Administrative Procedure Act ("APA") provides that "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof."[81] Under this principle of law, a party asserting a violation of Section 274, 275, or 260 has the burden of proving that the BOC has failed to comply with the statutory criteria. Absent a statutory exception, the Commission does not have authority to shift the burden of proof. There is no such exception here.

Under Section 202(a), the Commission has traditionally shifted the burden of proof to the defendant to demonstrate the reasonableness of its action when the complainant has satisfied its burden of proving that discrimination occurred. This is because the assertion of reasonableness is

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[78] *Notice* at ¶ 79, 83.

[79] *BOC In-Region NPRM* at ¶ 101.

[80] BellSouth Comments, CC Docket 96-149, at 35-37.

[81] 5 U.S.C. § 556(d).

considered an affirmative defense.[82] In other words, discrimination, once proven, is presumed to be a violation of Section 202(a) unless the defendant chooses to assert a justification for it. Justification becomes an issue only if asserted by the defendant and, accordingly, the defendant has the burden of proving it. As a result, a complainant is not required to negate all possible justifications for such discrimination in its affirmative case.

In proceedings involving complaints that a BOC has failed to comply with its responsibilities under Section 274, 275, or 260, the burden should shift to the BOC only where the BOC similarly asserts an affirmative defense, such as competitive necessity or the reasonableness of discrimination. In the absence of a new issue raised as an affirmative defense by the BOC, the complainant must carry the burden of proof.[83] Once the complainant makes out a *prima facie* case, the burden remains on the complainant to prove its case.[84]

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[82] *See, e.g., AT&T Communications, Inc. (Holiday Rate Plan),* 5 F.C.C.R. 1821, 1821 (1990), *reconsidering* 4 F.C.C.R. 7933, 7934 (1989).

[83] Indeed, if the Commission were to shift the burden of proof to a BOC defendant, competitors would have even greater incentives to file specious complaints and thereby cause BOCs to tie up considerable resources trying to prove the negative.

[84] This issue was clarified in 1994, when the Supreme Court overruled the prior interpretation that Section 7(c) of the APA, which provides that "except as otherwise provided by statute, the proponent of a rule or order has the burden of proof," 5 U.S.C. § 556(d), determined only the burden of going forward, not the burden of persuasion. Specifically, in *Office of Workers' Compensation Programs v. Greenwich Collieries*, 114 S. Ct. 2251, 2258 (1994), the Court held that Section 7(c) does, indeed, determine the "burden of persuasion," and thus requires that burden remain at all times with the proponent of the rule or order. See *Southwest Merchandising Corp. v. NLRB,* 53 F.3d 1334, 1339-40 (D.C. Cir. 1995); *see also Brosnan v. Brosnan,* 263 U.S. 345, 349 (1923), (holding that the imposition of burden of proof imposes the burden of persuasion, not simply the burden of establishing a *prima facie* case). The Court interpreted Congress' use of the term "burden of proof" in light of the meaning generally accepted in the legal community at the time Section 7(c) was enacted. *See generally,* J. McKelvey, Evidence 64 (4th ed. 1932) ("The proper meaning of [burden of proof]" is "the duty of the person alleging the case to prove it," rather than "the duty of the one party or the other to introduce evidence"). The Court, did, however, note that the burden to mount an affirmative defense could rest on the party opposing the order. 114 S. Ct. at 2258.

CONCLUSION

BellSouth urges the Commission to show restraint in its proposed adoption of rules to "clarify" or "implement" the requirements of Sections 260, 274, and 275 of the 1996 Act. Congress has already provided much definition of the obligations of BOCs under those sections and the Commission cannot add to those requirements through further "clarification". The better course is for the Commission simply to codify the provisions of the 1996 Act into its Rules.

Respectfully submitted,

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